No. 11866

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALFRED GLEN SYMONS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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Statement of the Case.

The defendant and appellant herein, Alfred Glen Symons, was indicted on two counts. Count One charges him with violating Title 26, United States Code, §2590(a) Count Two charges the defendant with violating Title 19, United States Code, §1593(b). The date of the alleged violation was on or about December 6, 1947. The narcotics involved consisted of approximately 1 pound, 3 ounces, 327 grains of bulk marihuana and 214 marihuana cigarettes.

Statement of Facts.

Appellant's opening brief does not contain a true, accurate or fair statement of the facts. Therefore, for the Court's consideration we respectfully submit the following statement.

On December 5, 1947, two police officers of the Manhattan Beach Police Department, Charles Frederick Grau and Brent Gray [T. 56],* responding to a call, made an investigation at the Ryan Motel [T. 16, 56]. At the request and with the permission of the landlady, they made a search of the premises [T. 20, 56, 57, 59] and found in a room of the motel a package of Zig-Zag cigarette papers [Government's Exhibit 2; T. 17, 18, 53, 59, 77] and a pillow slip [Government's Exhibit 3; T. 17, 18, 21, 53, 57] which contained fragments [Government's Exhibit 9; T. 76, 77, 78] of marihuana [T. 140, 141].

The car driven by the occupants of the room of the motel [T. 25, 63] was a Cadillac, License No. 8 J 813 [T. 26, 103] and was later identified as the defendant's car [T. 106]. An all-points broadcast was given by the officers to locate the car [T. 26, 63] and a call regarding it was received from the El Segundo Police [T. 26]. Police Officers Foster, Grau and Gray (in the uniform of the Manhattan Beach Police Department) accompanied by Sgt. Barr, a detective of the Los Angeles Police Department (in plain clothes), proceeded to 814 Bungalow

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*Note: Unless otherwise indicated by the volume number, all transcript pages referred to will be contained in Volume II.

Street in El Segundo, California [T. 28, 64, 95], arriving there sometime between 12:30 and 1 A. M. [T. 28, 35, 66, 85].

Sgt. Barr went to the front door with Officer Foster [T. 64, 96]. Police Officer Grau stationed himself at the rear of the house [T. 27, 64]. A conversation took place between Sgt. Barr and one of the occupants of the house [T. 64, 86, 87, 96]. Sgt. Barr stated to the occupants that they were police officers and when he heard sounds which appeared to be running in the house he hammered on the door three or four times and said, "Open up the door. We are going to bust it down" [T. 64, 96]. At that moment Officer Foster went to the northwest corner of the house to cover it [T. 87] and Officer Grau in the rear of the house saw the Venetian blind at the back window open up, then the window opened and he saw the defendant standing in the window. Officer Grau asked the defendant to open the front door because there were officers there [T. 27]. The defendant refused to do so. Sgt. Barr then picked up a flower pot and tossed it through the window in the front of the house and, reaching through the hole, unlatched the window, thereafter entering the house and opening the door for Officer Foster to enter [T. 96, 97]. The other officers came into the house and the defendant and his brother Raymond were apprehended and handcuffed [T. 65, 98]. A search of the house was made and over a small clothes closet [T. 83, 98], in the attic, with Officer Foster present, Sgt. Barr found a brown paper shopping bag [Government's Exhibit 4; T. 82, 99], which

was carried out to the livingroom where the defendant and his brother were seated, with the remaining officers present [T. 91, 92]. The shopping bag contained 12 sealed Prince Albert cans [Government's Exhibit 5; T. 37, 38, 83, 100], each can containing marihuana [T. 140]; a manila bag containing scotch tape and cigarette papers [Government's Exhibit 6; T. 39]; a manila envelope containing 199 cigarettes [Government's Exhibit 7; T. 40] made of marihuana [T. 141]; and an envelope containing 14 cigarettes [Government's Exhibit 8; T. 41] made of marihuana [T. 141].

Detective Sgt. Barr, at approximately 2 o'clock, phoned from 814 Bungalow Street, in the defendant's presence, to the Federal Building in Los Angeles and obtained the residence telephone number of Federal Narcotic Agent Craig. He called Craig and explained the circumstances and who he had in custody, and asked him to come on out [T. 104, 105, 110, 187].

(It was stipulated between defendant's counsel and Government's counsel that William J. Craig is an employee of the Federal Narcotics Bureau of the Treasury Department, the agent in charge, and that he received a phone call from Detective Sgt. Barr of the Los Angeles Police Department and that Theodore J. Heine is another Federal Narcotic Agent).

Craig and Heine arrived at 814 Bungalow Street, El Segundo, between 3:30 and 4 o'clock A. M. [T. 43, 90, 105, 112, 124]. Craig knocked on the door and they were admitted by Detective Sgt. Barr [T. 44, 112, 120]. The

police officers then turned over to Narcotic Agent Craig and Narcotic Agent Heine the Government Exhibits [T. 75, 107, 110, 111, 120, 122, 136].

The police officers and narcotic agents then left the residence at 814 Bungalow Street and proceeded to the Manhattan Beach Police Station with the defendant and his two brothers [T. 46, 76, 108, 115], the second brother having arrived at 814 Bungalow Street during the interim that the police officers were awaiting the arrival of Craig and Heine [T. 106, 198].

Narcotic Agents Craig and Heine thereafter proceeded from the Manhattan Beach Police Station with the three brothers in custody, and the marihuana, to the Federal Building in Los Angeles [T. 136, 200, 203].

Narcotic Agent Craig had several conversations with the defendant [T. 123]; one when he first arrived at 814 Bungalow Street, which was very brief [T. 124]; the second, at Manhattan Beach Police Station for approximately 15 or 20 minutes [T. 128]; and the third was at the office of the Bureau of Narcotics in the Federal Building at Los Angeles [T. 129]. The defendant admitted ownership of the marihuana [T. 133, 134, 190]. The two brothers of the defendant were released [T. 134] and the defendant was booked in jail [T. 137]. The defendant was not struck nor threatened by the police officers nor by the narcotic agents [T. 176, 178, 181, 183, 184, 185, 188, 193, 199, 200, 202, 203, 206, 207, 208, 209].

ARGUMENT.

I.

Provision of the Fourth Amendment Forbidding Unreasonable Searches and Seizures Is a Limitation on Government Agencies and Officers and Is Not Directed to Misconduct of State Officers.

The evidence discloses that, after being placed under arrest by the State officers in his home on December 6, 1947, the defendant was turned over to the custody of the Federal officers, with the narcotics seized at the time of his arrest, and was thereafter indicted on December 17, 1947. Appellant's attorney filed a timely motion on January 29, 1948, to suppress the evidence [Vol. I, T. 5, 6, 7], supported by the affidavit of the defendant [Vol. I, T. 10], wherein the appellant swears that the police officers breaking into the premises were representing Federal Government. Thereafter, on February 2, 1948, the Government filed its motion in opposition to the defendant's motion to suppress evidence which was supported by the affidavit of Detective A. M. Barr of the Los Angeles Police Department [Vol. I, T. 14], one of the police officers who broke into the defendant's premises and arrested him, along with affidavits of William C. Craig [Vol. I, T. 18] and Theodore J. Heine [Vol. I, T. 22], narcotic agents of the Bureau of Narcotics, United States Treasury Department. Barr in his affidavit states that neither the police officers of Manhattan Beach or Barr himself represented the Federal Government and had identified themselves, after entering the house, as police officers of the Los Angeles Police Department and the Manhattan Beach Police Department; that prior to the arrest and seizure of the evidence no knowledge of the arrest was had or given agents of the Federal Bureau; and that the first informa-

tion received by Narcotic Agents Craig and Heine concerning the arrest of the defendant and the seizure of the narcotics was two hours after the arrest had taken place. This was further supported by affidavits of Narcotic Agents Craig [Vol. I, T. 18] and Heine [Vol. I, T. 20]. Defendant's motion to suppress the evidence, after hearing and argument, was denied [T. 6].

Counsel's first argument (paragraph 1, page 7) fails completely because it is based upon the false premise that the State officers acted as Federal agents and in cooperation with the Federal officers. The record in no way supports such a conclusion and, as a result, appellant's contention (page 7) is wholly without merit and falls on its own weight.

The trial court found on uncontradicted evidence that the narcotic agents did not act in concert with the Manhattan police officers or the Los Angeles police officers. The arrest and entry into the premises at 814 Bungalow Street by the State officers occurred between the hours of 12:30 and 1 A. M. and thereafter the narcotics were found. The first knowledge the narcotic agents had of the arrest of the defendant and the seizure of the narcotics was subsequent to the telephone call to the Federal Building at 2 A. M. of the same morning by a Los Angeles police detective, Sgt. Barr. Indicative of the lack of knowledge is the fact that Detective Sgt. Barr did not have Narcotic Agent Craig's telephone number and talked to the operator in the Federal Building in Los Angeles, telling her of the urgent need to get in touch with Craig. Thereafter, the

operator called Detective Sgt. Barr and gave him Narcotic Agent Craig's residence telephone number. After Barr's call, Narcotic Agents Craig and Heine arrived at 814 Bungalow Street at 3:15 A. M., knocked on the door and then were admitted by Detective Sgt. Barr. Whereupon, the defendant and the narcotics were turned over to the narcotic agents.

The facts and circumstances leading to the arrest of the defendant and the seizure of the narcotics by the State officers do in themselves indicate that the State officers were acting "on their own"—the answer to the call from the Ryan Motel and the search of the premises made at the request of the landlady, wherein Government's Exhibits 2, 3 and 9 were found, was a routine Manhattan Beach police call; the all-points radio broadcast given by the officers of the Manhattan Beach police officers in an attempt to locate the defendant's car; the locating of the car by the El Segundo police at 814 Bungalow Street; the arrival of Detective Sgt. Barr of the Los Angeles Police Department in response to a call from the Manhattan Beach Police Department; the arrest of the defendant and the seizure of the narcotics—all show a chain of events unplanned, leading up to the arrest of the defendant and the seizure of the narcotics by the police officers, with a complete lack of knowledge of the events on the part of the Federal narcotic agents.

It is well settled law that the protection of the Fourth Amendment extends to all equally and, when properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search and seizure made in violation of his rights under the Fourth Amendment. The prohibition applies only to

the National Government and its agencies and does not reach out to alleged misconduct of individual State officers.

Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652;

Edgmon v. United States, 87 F. 2d 13, 15;

Boyd v. United States, 116 U. S. 616; 29 L. Ed. 746, 6 S. Ct. 524;

Burdeau v. McDowell, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 1159;

Aldridge v. United States, 67 F. 2d 956;

Schroeder v. United States, 7 F. 2d 60;

Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97;

Rettich v. United States, 84 F. 2d 118.

"Evidence secured through unlawful search and seizure by the state officers not acting directly or indirectly in behalf of the United States, is admissible in a prosecution in the national courts."

Edgmon v. United States, supra;

Burdeau v. McDowell, supra;

Aldridge v. United States, supra;

Derskov v. United States, 4 F. 2d 540;

Miller v. United States, 50 F. 2d 505;

Schroeder v. United States, supra.

In *Grice v. United States* (146 F. 2d 849), the Court said:

"One case arose out of a seizure of coupons made at or near Fayetteville, N. C., when the car in which defendant was riding was stopped by state officers,

who were engaged in checking automobiles for motor vehicle violations. In the course of a search conducted by the state officers the counterfeit coupons were discovered in defendant's pocketbook. There is nothing in the record to indicate that the state officers were acting in cooperation with the Federal authorities or that the latter had anything whatever to do with the stopping of defendant's car or the search of his pocketbook. This being true, there was no error in admitting the coupons in evidence in a federal prosecution."

Feldman v. United States, 322 U. S. 487, 492, 64 S. Ct. 1082;

Gambino v. United States, 275 U. S. 310, 317, 48 S. Ct. 137, 72 L. Ed. 293, 52 A. L. R. 1381;

Byars v. United States, 273 U. S. 28, 33, 47 S. Ct. 248, 71 L. Ed 520;

Burdeau v. McDowell, supra;

Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392, 40 S. Ct. 182, 64 L. Ed. 319, 24 A. L. R. 1426.

In *United States v. Diuguid* (146 F. 2d 848):

"The court found on uncontradicted evidence that the federal agents did not act in concert with the police officers and that the federal officers knew nothing about the raid until it had been made. This is enough to establish those facts. *United States v. Nardone,* 2 Cir., 127 F. (2d) 521. It follows that whether the search and seizure by the police was lawful or not the evidence was admissible against the

appellant. *Burdeau v. McDowell, supra.* When federal officers are not guilty of misconduct, evidence will not be suppressed merely because it was unlawfully seized by the police before the federal officers took possession of it. *Miller v. United States,* 3 Cir., 50 F. (2d) 505."

The cases cited by the appellant in an attempt to sustain his position, which are palpably unsound, are distinguishable from the case at bar in the following respects. In *United States v. Di Re* (332 U. S. 581, 92 L. Ed (No. 6) 281), the search and seizure made by the State officers was in conjunction with a Federal officer who did not have power to arrest, and the state officer arresting Di Re arrested him without a warrant for the commission of a misdemeanor not committed in the presence of the arresting officer in violation of the New York Penal Code. Likewise, in *United States v. Anne Johnson* (333 U. S. 10, 92 L. Ed. (No. 8) 323), a Federal officer was involved in the arrest and acted in conjunction with the State officers. The opinion in the case of *Trupiano et al. v. United States* (decided June 14, 1948, No. 427, Oct. Term 1947, 16 L. W. 4589), discloses that the search and seizure without a warrant was conducted wholly by agents of the Federal Government. In the present case neither Narcotic Agent Craig nor Narcotic Agent Heine participated in the search of the home of the defendant. It is therefore submitted that the right of Federal Government cannot be questioned in availing itself of evidence improperly seized by State officers operating entirely upon their own.

II.

The Arrest of the Defendant Did Not Violate the Fourth and Fifth Amendments to the Constitution of the United States.

In both the *Byars* and *Di Re* cases cited by the appellant to sustain his position, the arrests were made in conjunction with an illegal search and seizure wherein Federal agents participated. The record shows this is not so in the case at bar.

The principles of the common law govern and define when an arrest without a warrant may be made for an offense against the United States. The police officers of the Federal Government are the Marshals and their deputies,[1] the members of the Division of Investigation of the Department of Justice,[2] the special agents attached to The Customs Investigation Unit, The Customs Patrol, The Coast Guard, The Bureau of Narcotics, The Alcohol Tax Unit Enforcement Division, The Secret Service, The Bureau of Internal Revenue Intelligence Unit, The Post Office Inspectors, and The Immigration Border Patrol of the Labor Department.

> *Carroll v. United States,* 267 U. S. 132, 69 L. Ed. 543, 45 S. Ct. 280.

It is well settled that an officer or private person may arrest a person for a misdemeanor without a warrant only when the misdemeanor has been committed in his presence; they may likewise without a warrant arrest a person who has in fact committed a felony; and a police officer only

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[1]28 U. S. C., §§503, 504.

[2]5 U. S. C., §300A.

may arrest without a warrant a person believed by him upon reasonable cause to have been guilty of a felony.

Carroll v. United States, supra;

Kurtz v. Moffitt, 115 U. S. 487, 29 L. Ed. 458, 6 S. Ct. 148;

Elk v. United States, 17 U. S. 529, 44 L. Ed. 874, 20 S. Ct. 729;

5 U. S. C. §300A.

Assuming for the sake of argument only, but certainly not conceding that the arrest of the defendant by the State officers was not valid, the following *quare* would arise, did it affect the arrest of the defendant made by Federal Narcotic Agents Craig and Heine? Upon receipt of the telephone call from Sgt. Barr on the morning of the arrest there was no question in the minds of the narcotic agents that a felony had been committed by the defendant by reason of his possession of the narcotics in violation of a Federal Act (Title 26, U. S. C. §2593(a).) In view of their direct knowledge that the defendant possessed narcotics, the narcotic agents not only had probable cause to believe that a felony had been committed by the defendant but had actual knowledge of its commission from the information given Narcotic Agent Craig by Sgt. Barr over the telephone.

The appellant proceeds on the theory that the Government must sustain the validity of the arrest by the State officers. This is not necessary. Incidentally, however, the validity of the arrest by the State officers can be sustained. The police officers were members of the Manhattan Beach police force and the Los Angeles police force, and arrest of the defendant and seizure of the narcotics occurred in the City of El Segundo. Whether or not the State officers

acted in the capacity of peace officers or as private persons is not material to our argument as both have the same rights in making arrests under §836[3] of the California Penal Code (Arrest by peace officers, paragraphs 2 and 3) and §837[4] of the California Penal Code (Arrest of private persons, paragraphs 2 and 3), with the peace officers having additional rights with respect to an arrest for a felony at night, under paragraph 5 of §836. The finding of the fragments of marihuana at the Ryan Motel by the police officers gave them reasonable cause to believe that a felony had been committed (*i. e.,* possession of marihuana) and was being committed. The obtaining of the license number of the defendant's car and the tracing of the car to the defendant's address at 814 Bungalow Street, El Segundo, logically supports the position of the police officers that they had probable cause to believe that the defendant had committed and was committing a felony in possessing the narcotics.

Section 844 of the California Penal Code reads:

> "Arrests, entries for. To make an arrest, a private person, if the offense be a felony, and in all cases a

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[3]§836. Arrest by peace officers. A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person: 1. For a public offense committed or attempted in his presence. 2. When a person arrested has committed a felony, although not in his presence. 3. When a felony has been in fact committed and he has reasonable cause for believing the person arrested to have committed it. 4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested. 5. At night, when there is a reasonable cause to believe that he has committed a felony.

[4]§837. Arrest of private persons. A private person may arrest another: 1. For a public offense committed or attempted in his presence. 2. When the person arrested has committed a felony, although not in his presence. 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."

Before breaking into the house Detective Sgt. Barr knocked on the door several times and talked with a person inside. Sgt. Barr stated that they were police officers, requested admission, and informed the occupants that unless they opened the door he would break in. Then, after hearing what sounded like persons running in the house, he again demanded admittance and waited approximately 30 seconds after that before breaking in the window to open the door.

Appellant raises the further point that the police officers in making the arrest failed to inform the defendant of their intention to arrest him, of the cause of the arrest, and of their authority to make it, overlooking the exceptions set out in §841[5] of the California Penal Code that such is not necessary when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, such as the defendant in this case was doing in possessing narcotics.

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[5]§841. Arrest, how made. The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape.

III.

The Trial Court Did Not Err in the Admission of the Statements of the Defendant.

"It is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but on the contrary, if the confession was voluntary it is sufficient though it appears that he was not so warned."

Powers v. United States, 223 U. S. 303;

Hardy v. United States, 186 U. S. 224;

Bram v. United States, 168 U. S. 532;

Wilson v. United States, 162 U. S. 613;

Pierce v. United States, 160 U. S. 355;

Sparf and Hanson v. United States, 156 U. S. 51.

The testimony at the time of the trial showed that Narcotic Agent Craig had three conversations with the defendant on the morning of the arrest. The first was a brief conversation lasting two or three minutes at 814 Bungalow Street [T. 127, 128], a second conversation, for ten or fifteen minutes was had at the police station at Manhattan Beach [T. 128, 129] and a third conversation occurred in the Federal Building at Los Angeles [T. 131]. Agent Craig testified regarding the third conversation as follows:

A. I asked Agent Heine to bring the defendant into my office. They came in together. And at that time I told him that I intended to release his brothers and prefer no charges against them.

And I then asked him if he had anything to say about the marihuana. He replied, "It is mine."

I then told him I was taking his brothers back to Manhattan Beach and that Agent Heine would take him to the County jail.

Q. After that did you have any further conversation with him? A. On two occasions during the month of January 1948.

Q. Who was present? A. Agent Heine.

Q. Was the defendant present? A. He was.

Q. Where did they take place? A. In the Narcotic office.

The defendant stated he had purchased the marihuana seized in this case from a man known as Chungo who lived on the east side of Los Angeles. And he stated he was willing to assist the Narcotic Bureau in apprehending him.

This last statement, in January 1948, was made over a month subsequent to the filing of the indictment and the defendant's arraignment before a Commissioner. It logically follows that the defendant, having made this statement voluntarily in the Narcotic office in January of 1948, made his admission of the ownership of the marihuana on the morning of the arrest freely and voluntarily. As a matter of fact, the testimony of Agent Craig indicates clearly that he had told the defendant that he was going to release his two brothers prior to the defendant's admission of ownership of the marihuana [T. 133].

When called on rebuttal, the State officers and the narcotic agents testified that the defendant was not struck nor threatened at any time [T. 176].

The admissibility of such evidence was a question for the trial court to determine in the exercise of sound discretion.

> *Hopt v. Utah,* 110 U. S. 574, 583, 4 S. Ct. 202, 28 L. Ed. 262.

In *Hopt v. Utah, supra,* the Supreme Court of the United States, on page 584 (4 S. Ct. 207), concerning the confessions of an accused, said:

> "A confession if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession, said Eyre, C. B., 1 Leach 263, 'is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers.' Elementary writers of authority concur in saying that, while from the very nature of such evidence it may be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession"—citing 1 Greenleaf, Ev. §215; 1 Archbald, Cr. Pl. 125; 1 Phillips', Ev. 533, 534; Starkie, Ev. 73.

The trial court determined that the statements and admissions made by the defendant were free and voluntary and we submit the evidence bears out the fact that the trial court ruling was correct.

IV.

The Evidence Was Sufficient to Support the Conviction Upon Count One of the Indictment.

The defendant was found guilty on both counts of the indictment and sentence was imposed upon him the 18th day of February, 1948, whereby he was given two years on each of the counts, to be served concurrently. The Government will therefore not attempt to sustain its position on the second count and will admit error, as such error will not affect the sentence given under the first count.

In compliance with §2593 of Title 26, U. S. C. A.,[1] the violation of which the defendant was found guilty, the Deputy Collector served upon the defendant a notice and demand [Government's Exhibit 1] for the defendant to produce the order form required by §2592(a).[2] And the defendant's failure to produce the order form so required

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[1]§2593. Unlawful possession. (a) Persons in general. It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590(a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shald have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590(a).

[2]§2591. Order forms. (a) General requirement. It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary.

is presumptive evidence of his guilt under this section and of liability for the tax imposed by §2590(a).[3]

The Deputy Collector, in fact, testified that prior to serving the notice and demand upon the defendant he had made a search of the records required to be preserved under the provisions of §2591 and section 3233 of Title 26, U. S. C. A.,[4] and found no record of the defendant having filed a registration card as a dealer in narcotics.

It is therefore submitted that the defendant did not rebut the presumption of the evidence of guilt under §2593, Title 26, U. S. C. A. and the evidence was sufficient to sustain Count One of the indictment.

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[3]§2590. Tax. (a) Rate. There shall be levied, collected, and paid upon all transfers of marihuana which are required by section 2591 to be carried out in pursuance of written order forms taxes at the following rates: (1) Transfer to special taxpayers. Upon each transfer to any person who has paid the special tax and registered under sections 3230 and 3231, $1 per ounce of marihuana or fraction thereof. (2) Transfers to others. Upon each transfer to any person who has paid the special tax registered under sections 3230 and 3231, $100 per ounce of marihuana or fraction thereof.

[4]§3233. Returns. (a) Registrants. Any person who shall be registered under the provisions of section 3231 in any internal-revenue district shall, whenever required so to do by the collector of the district, render to the collector a true and correct statement or return, verified by affidavits, setting forth the quantity of marihuana received or harvested by him during such period immediately preceding the demand of the collector, not exceeding three months, as the said collector may fix and determine. If such person is not solely a producer, he shall set forth in such statement or return the names of the persons from whom said marihuana was received, the quantity in each instance received from such persons, and the date when received.

Conclusion.

In conclusion, respondent respectfully submits that none of the evidence offered and admitted by the trial court for the prosecution was obtained in violation of the Fourth and Fifth Amendments of the Constitution of the United States, or any other law; that all evidence had been originally secured by the State officers who neither acted as, nor in conjunction with, the Federal Narcotic Agents. We further urge that the arrest of the defendant was legal and accomplished in accordance with the laws of the United States and the State of California.

The evidence discloses that the statements of the defendant containing admissions were free and voluntary and that they were properly admitted against the defendant.

As to the verdict, although we confess error to the Second Count, we submit with equal force that the evidence was more than sufficient to support the conviction of the defendant upon Count One and that the conviction on said count should stand.

For the reasons set forth we pray that judgment on Count One be sustained.

Respectfully submitted,

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